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13 UNITED STATES OF AMERICA

14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 JOSE MANUEL PEREZ,
aka "Julio Rodriguez,"

20 Defendant.
21
22

No. CR 22-597(A)-RGK

GOVERNMENT'S TRIAL MEMORANDUM

Trial Date: May 30, 2023
Trial Time: 9:00 a.m.
Location: Courtroom of the
Hon. R. Gary
Klausner

23 Plaintiff United States of America, by and through its counsel
24 of record, the Acting United States Attorney for the Central District
25 of California and Assistant United States Attorneys Matthew O'Brien,
26 Brian Faerstein, and Juan M. Rodriguez, hereby files its Trial
27 Memorandum.
28

//

1 The government respectfully reserves the right to supplement or
2 modify this memorandum as may be appropriate.

3 Dated: May 24, 2023

Respectfully submitted,

4 E. MARTIN ESTRADA
5 United States Attorney

6 MACK E. JENKINS
7 Assistant United States Attorney
8 Chief, Criminal Division

9 _____/s/_____
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15 UNITED STATES OF AMERICA
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Defendant Jose Manuel Perez ("defendant") was under federal investigation for wildlife smuggling. During the course of that investigation, defendant was apprehended and his phone was seized. Pursuant to federal search warrants, his phone was searched. On his phone, defendant, a convicted felon, had numerous pictures and videos of himself handling or playing with firearms (as well as ammunition), despite defendant knowing that he was prohibited from possessing such items. For these acts, defendant is now charged with three counts of felon in possession of a firearms, in violation of 18 U.S.C. § 922(g)(1).

II. STATUS OF CASE**A. Indictment and First Superseding Indictment**

On December 16, 2022, a grand jury returned a two-count indictment charging defendant with being a felon in possession of a firearms, in violation of 18 U.S.C. § 922(g)(1). (Dkt. 1.) On February 14, 2023, the grand jury returned a three-count first superseding indictment charging defendant with being a felon in possession of a firearms, in violation of 18 U.S.C. § 922(g)(1). (Dkt. 20.)

B. Discovery

The discovery in this case includes reports, photographs, certified court records, and information regarding defendant's criminal history, as well as expert materials, among other things. Throughout the government's trial preparation, additional discovery will be generated (e.g., Jencks) and the government will produce that discovery in a timely, expeditious manner. As of the date of this

1 Trial Memorandum, defense counsel has not produced any reciprocal
2 discovery despite the government's repeated requests.

3 **C. Trial**

4 Trial Date: A jury trial in this matter is scheduled to begin on
5 May 30, 2023, at 9:00 a.m., before this Court. Defendant's case is
6 unique in that the thrust of the government's evidence is digital in
7 nature. Stated differently, the government's case-in-chief will rely
8 heavily on evidence obtained from defendant's phone showing his
9 illegal possession of firearms, as opposed to calling witnesses who
10 may have seen defendant's illegal possession of firearms.
11 Accordingly, the government anticipates moving to admit into evidence
12 a large number of photographs, videos, text messages, and audio
13 files.

14 Estimated Time: The government anticipates that its case-in-
15 chief will last approximately three days.

16 **D. Defendant**

17 Defendant is in custody pending trial.

18 **E. Government Witnesses**

19 The government estimates that it will call most or all of the
20 following ten witnesses in its case-in-chief: (1) U.S. Fish and
21 Wildlife ("FWS") Special Agent Jared Eatmon; (2) former FWS Special
22 Agent Justin Mays; (3) FWS Special Agent in Charge Jonathan Jacobs;
23 (4) Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF")
24 Special Agent Alexander Liwinski; (5) ATF Special Agent Christopher
25 Stantzos; (6) Spanish-language translator Sharon Spence; (7) Arizona
26 State Trooper Ryan Poirier; (8) Ventura Animal Control Officer
27 Fernando Serratos; (9) D.R. (an acquaintance of defendant); and (10)
28

1 D.P. (defendant's former landlord).¹

2 **F. Stipulations**

3 Defendant refused to enter into any factual or evidentiary
4 stipulations, including about his prior convictions and status as a
5 felon, and his knowledge of his felony status. Accordingly, the
6 government has filed a motion in limine to admit defendant's prior
7 convictions substantively. (Dkt. 39.)

8 Defendant also refused to stipulate that the firearms in this
9 case were manufactured outside of the state of California and,
10 therefore, were shipped or transported in interstate or foreign
11 commerce to California. Accordingly, the government intends to call
12 an expert witness on this subject, whom the government timely
13 noticed.

14 Defendant also refused to stipulate to the admissibility of any
15 of the government's exhibits as well as the accuracy of translations.
16 Accordingly, the government intends to call an expert witness in the
17 Spanish language, whom the government timely noticed.

18 **G. Pretrial Motions**

19 The government has filed one motion in limine to admit evidence
20 of defendant's prior convictions substantively and for impeachment
21 purposes under Federal Rule of Evidence 609. (Dkt. 39.) On February
22 3, 2023, the government provided the defense with detailed notice
23 that the government intends to introduce at trial other crimes,
24 wrongs, or acts committed by defendant pursuant to Federal Rule of
25 Evidence 404(b). The notice is attached hereto as **Exhibit A**.

26
27
28 ¹ This represents the government's current witness list. The
government reserves the right to not call any of these witnesses or
to call additional witnesses, if it deems necessary at trial.

1 The defense has not objected to the government's notice and,
2 relatedly, has not filed any motions in limine.

3 **III. THE CHARGED OFFENSE**

4 **A. Governing Statute**

5 Title 18, United States Code, Section 922(g)(1) provides, in
6 pertinent part, that "[i]t shall be unlawful for any person who has
7 been convicted in any court of, a crime punishable by imprisonment
8 for a term exceeding one year . . . [to] possess in or affecting
9 commerce, any firearm or ammunition."

10 **B. Elements of 18 U.S.C. § 922(g)(1)**

11 For defendant to be found guilty of being a felon in possession
12 of a firearm, with regards to each count, the government must prove
13 the following:

14 (1) defendant knowingly possessed a firearm;

15 (2) the firearm had been shipped or transported from one state
16 to another or between a foreign nation and the United States;

17 (3) at the time the defendant possessed the firearm, the
18 defendant had been convicted of a crime punishable by imprisonment
19 for a term exceeding one year; and

20 (4) at the time the defendant possessed the firearm, the
21 defendant knew he had been convicted of a crime punishable by
22 imprisonment for a term exceeding one year.

23 Ninth Cir. Manual of Model Crim. Jury Instr. No. 14.16 (2022 ed.).

24 1. Mens Rea

25 Section 922(g) requires that a defendant knowingly possessed a
26 firearm and that defendant knew he belonged to a relevant category of
27 persons barred from possessing a firearm. Rehaif v. United States,
28 139 S. Ct. 2191, 2200 (2019). An act is done "knowingly" if the

1 defendant is aware of the act and does not act through ignorance,
2 mistake, or accident. See Ninth Cir. Manual of Model Crim. Jury
3 Instr. No. 4.8 (2022 ed.). Defendant need not know that the firearm
4 traveled in or affected interstate commerce. United States v. Stone,
5 706 F.3d 1145, 1146 (9th Cir. 2013).

6 Moreover, because Section 922(g)(1) focuses on the status of the
7 defendant, and not on his state of mind at the time of the offense,
8 the government need not prove "bad motive or intent." United States
9 v. Johnson, 459 F.3d 990, 996 (9th Cir. 2006). In other words, a
10 defendant violates Section 922(g)(1) even if the defendant believes
11 "his gun possession was reasonable and in good faith, and thus
12 without intention to violate the law." Id. Defendant's "knowledge
13 of the legality or illegality of his conduct is irrelevant to his
14 conviction on the felon-in-possession charge." United States v.
15 Wilson, 437 F.3d 616, 620 (7th Cir. 2006).

16 2. Possession

17 A defendant has "possession" of something if he "knows
18 of its presence and has physical control of it," or knows of its
19 presence and "has the power and intention to control it." United
20 States v. Thongsy, 577 F.3d 1036, 1040-41 (9th Cir. 2009) (*italics*
21 *omitted*); Ninth Cir. Manual of Model Crim. Jury Instr. No. 6.15 (2022
22 ed.). Even a short period of possession may support a conviction
23 under 18 U.S.C. § 922(g)(1). "The statute explicitly punishes
24 'possession,' not retention, and thus in no way invites investigation
25 into . . . how long that possession lasted." Johnson, 459 F.3d at
26 996 (brackets and internal quotation marks omitted). Finally,
27 "[m]ore than one person can be in possession of something if each
28 knows of its presence and has the power and intention to control it."

1 United States v. Carrasco, 257 F.3d 1045, 1050 (9th Cir. 2001).

2 While jury unanimity is required for each principal element of a
3 crime, “‘a federal jury need not always decide unanimously which of
4 several possible sets of underlying brute facts make up a particular
5 element, say, which of several possible means the defendant used to
6 commit an element of the crime.’” Richardson v. United States, 526
7 U.S. 813, 817 (1999).

8 3. Interstate Commerce

9 To meet the jurisdictional element, “there need be only a
10 minimal nexus that the firearm ha[s] been, at some time, in
11 interstate commerce.” United States v. Rousseau, 257 F.3d 925, 933
12 (9th Cir. 2001). “[A] past connection to interstate commerce is
13 sufficient”; the firearm does not have to have recently moved in or
14 recently affected interstate commerce. Id.

15 **IV. STATEMENT OF FACTS**

16 The government expects that the evidence at trial will establish
17 the following facts, among others:

18 Between on or about August 12, 2021 and December 25, 2021, in
19 Ventura County, within the Central District of California, and
20 elsewhere, defendant knowingly possessed a firearm, namely, a Smith &
21 Wesson, model 39-2, 9mm caliber pistol, bearing serial number
22 A125879, in and affecting interstate and foreign commerce.

23 Further, between on or about January 25, 2022 and February 12,
24 2022, in Ventura County, within the Central District of California,
25 defendant knowingly possessed a firearm, namely, a Kimber, model
26 Stainless II, .45 automatic caliber pistol, bearing serial number
27 K599405, in and affecting interstate and foreign commerce.

28 Lastly, on or about February 12, 2022, in Ventura County, within

1 the Central District of California, defendant knowingly possessed a
2 firearm, namely, a Springfield Armory, model XD-9, 9mm Luger caliber
3 pistol, bearing serial number US887870, in and affecting interstate
4 and foreign commerce.

5 When defendant possessed each of the firearms mentioned above,
6 he knew he has been convicted of at least one crime punishable by
7 imprisonment for a term exceeding one year, and he knew that at least
8 one of those crimes had not been vacated or overturned.

9 **V. LEGAL AND EVIDENTIARY ISSUES**

10 **A. Authentication and Foundation**

11 Federal Rule of Evidence 901(a) provides that "[t]he requirement
12 of authentication or identification as a condition precedent to
13 admissibility is satisfied by evidence sufficient to support a
14 finding that the matter in question is what its proponent claims."
15 Under Rule 901(a), evidence should be admitted, despite any
16 challenge, once the government makes a prima facie showing of
17 authenticity or identification so "that a reasonable juror could find
18 in favor of authenticity or identification . . . [because] the
19 probative force of the evidence offered is, ultimately, an issue for
20 the jury." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th
21 Cir. 1991) (citations and internal quotation marks omitted); see also
22 United States v. Gadson, 763 F.3d 1189, 1204 (9th Cir. 2014).

23 **B. Expert Opinion Testimony**

24 A qualified expert witness may provide opinion testimony on a
25 fact at issue if specialized knowledge will assist the trier of fact.
26 Fed. R. Evid. 702. The Court has broad discretion to determine
27 whether to admit expert testimony. United States v. Andersson, 813
28 F.2d 1450, 1458 (9th Cir. 1987). Expert opinion may be based on

1 hearsay or facts not in evidence, where the facts or data relied upon
2 are of the type reasonably relied upon by experts in the field. Fed.
3 R. Evid. 703. An expert may also provide opinion testimony even if
4 it embraces an ultimate issue to be decided by the trier of fact.
5 Fed. R. Evid. 704.

6 The government has timely designated and intends to call three
7 experts at trial: (1) ATF Special Agent Alex Liwienski; (2) FWS
8 Special Agent in Charge Jonathan Jacobs; and (3) Sharon Spence. The
9 government has noticed their testimony as expert testimony, and has
10 provided defense counsel summaries of the testimony they are expected
11 to give. All are qualified as experts to testify and provide their
12 expert opinions.

13 ATF Special Agent Liwienski will testify that, among other
14 things, the following firearms, which are depicted in pictures and
15 videos found on defendant's phone, are firearms, as the term is
16 defined in 18 U.S.C. § 921(a)(3), and traveled in or affected
17 interstate or foreign commerce: (1) the Smith & Wesson, model 39-2,
18 9mm caliber pistol, bearing serial number A125879; (2) Kimber, model
19 Stainless II, .45 automatic caliber pistol, bearing serial number
20 K599405; (3) Springfield Armory, model XD-9, 9mm Luger caliber
21 pistol, bearing serial number US887870. Defendant has not objected
22 to the introduction of SA Liwienski's testimony or his qualifications
23 as an expert.

24 SAC Jacobs will testify regarding the FWS's procedures and
25 methodologies related to computer forensics and their reliability,
26 the imaging and duplication of data storage devices, the processing
27 of device images with forensic tools, verifying the process of
28 imaging and copying, providing agents with access to an exact copy of

1 the original devices, and extracting specific portions of forensic
2 copies at the request of agents. Specifically, SAC Jacobs will
3 testify about the examination of Mr. Perez's cellphone (an Apple
4 iPhone 12 with iOS 14.5.1 installed) using GrayKey, which is a
5 cellphone forensics tool.

6 Additionally, SAC Jacobs will discuss the nature and structure
7 of computer file systems and file storage structures (i.e., folders
8 and directory trees) as they relate to the locations where files were
9 stored on a digital device. Stated differently, SAC Jacobs will
10 discuss how metadata, which includes folders and directory trees,
11 associated with a media file (e.g., pictures, videos, etc.) can
12 identify whether a particular media file retrieved from a media
13 storage device was created with that media storage device or another
14 device. Defendant has not objected to the introduction of SAC
15 Jacobs's testimony or his qualifications as an expert.

16 Sharon Spence will testify that, among other things, she
17 listened to or reviewed a number of government exhibits, including
18 communications (e.g., messages), audio files, and audio/video files
19 containing the Spanish language. She will also testify that she
20 reduced the Spanish language audio to writing, that she then
21 translated the Spanish language audio into the English language and
22 created transcripts of the translations. Ultimately, she will
23 testify that the transcripts are true, accurate, and correct
24 translations.

25 The government should be permitted to introduce expert opinion
26 testimony from all three experts. This testimony will assist the
27 trier of fact in understanding the evidence and determining facts at
28 issue. See e.g., United States v. Dunn, 946 F.2d 615, 618 (9th Cir.

1 1991) ("The Ninth Circuit allows expert testimony regarding the
2 identity of the manufacturer to establish that a gun travelled in
3 interstate commerce before the defendant received it.")

4 **C. Lay Witness and Lay Law Enforcement Testimony**

5 Federal Rule of Evidence 701 "permits a lay witness to give
6 opinion testimony as long as the opinion is (a) rationally based on
7 the perception of the witness and (b) helpful to a clear
8 understanding of the witness's testimony or the determination of a
9 fact in issue." United States v. Pino-Noriega, 189 F.3d 1089, 1097
10 (9th Cir. 1999) (quotation marks omitted). Lay opinion testimony by
11 law enforcement officers is admissible and not necessarily expert
12 testimony within the meaning of Rule 16(a)(1)(G). See United States
13 v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995); see also United
14 States v. Barragan, 871 F.3d 689, 703-704 (9th Cir. 2017); Gadson,
15 763 F.3d at 1209 ("[A]n investigator who has accumulated months or
16 even years of experience with the events, places, and individuals
17 involved in an investigation necessarily draws on that knowledge when
18 testifying; indeed, it is those out-of-court experiences that make
19 the witness's testimony helpful to the jury."). Rule 16 notice is
20 not required for lay witnesses. United States v. Moreno, 243 F.3d
21 551 (9th Cir. 2000) ("Rule 16 notice was not required, however,
22 because this testimony was properly admitted as the opinion of
23 a lay witness."). The remaining five witnesses are testifying as lay
24 witnesses.

25 **D. Cross-Examination of Defendant**

26 The government is unaware whether defendant intends to testify
27 at trial. If defendant does testify, the government should be
28 permitted to fully cross-examine him. Specifically, should defendant

1 testify, the government reserves the right to cross-examine him
2 regarding his prior convictions to: (1) impeach defendant's
3 "character for truthfulness" and (2) to refute defendant's
4 contention, if any, that he is unfamiliar with firearms, as more
5 fully explain in the government's motion in limine. (Dkt. 52).

6 As explained in the government's motion in limine, a defendant
7 who testifies at trial waives his right against self-incrimination
8 and subjects himself to cross-examination concerning all matters
9 reasonably related to the subject matter of his testimony. See,
10 e.g., Ohler v. United States, 529 U.S. 753, 759 (2000) ("It has long
11 been held that a defendant who takes the stand in his own behalf
12 cannot then claim the privilege against cross-examination on matters
13 reasonably related to the subject matter of his direct
14 examination."). A defendant has no right to avoid cross-examination
15 on matters that call into question his claim of innocence. United
16 States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981).
17 The scope of a defendant's waiver is co-extensive with the scope of
18 relevant cross-examination. United States v. Cuozzo, 962 F.2d 945,
19 948 (9th Cir. 1992); United States v. Black, 767 F.2d 1334, 1341 (9th
20 Cir. 1985) ("What the defendant actually discusses on direct does not
21 determine the extent of permissible cross-examination or his waiver.
22 Rather, the inquiry is whether 'the government's questions are
23 reasonably related' to the subjects covered by the defendant's
24 testimony.").

25 **E. Photographs**

26 Photographs are generally admissible as evidence. See United
27 States v. Stearns, 550 F.2d 1167, 1171 (9th Cir. 1977) (photographs
28 of crime scene admissible). Photographs should be admitted so long

1 as they fairly and accurately represent the event or object in
2 question. United States v. Oaxaca, 569 F.2d 518, 525 (9th Cir.
3 1978). Also, "[p]hotographs are admissible as substantive as well as
4 illustrative evidence." United States v. May, 622 F.2d 1000, 1007
5 (9th Cir. 1980). Photographs may be authenticated by a witness who
6 "identif[ies] the scene itself [in the photograph] and its
7 coordinates in time and place." See Lucero v. Stewart, 892 F.2d 52,
8 55 (9th Cir. 1989) (internal quotation marks omitted).

9 Here, the bulk of the government's evidence of defendant's
10 unlawful possession of firearms consists of photos and videos
11 defendant took of himself holding the firearms. For this reason, the
12 photographs and videos are relevant evidence and admissible at trial.

13 **F. Affirmative Defenses**

14 Defendant has not given notice of his intent to rely on any
15 defense of entrapment, mental incapacity, alibi, or any other
16 affirmative defense, despite the government's request for such notice
17 of intent. Therefore, to the extent defendant may attempt to rely on
18 such a defense, the government reserves the right to object and to
19 move to preclude the defendant from asserting such a defense.

20 **G. Reciprocal Defenses**

21 Rule 16 requires defendant to produce to the government three
22 categories of materials that he intends to introduce as evidence at
23 trial: (1) documents and tangible objects; (2) reports of any
24 examinations or tests; and (3) expert witness disclosures. Fed. R.
25 Crim. P. 16(b)(1). Rule 16 imposes on defendants a continuing duty
26 to disclose these categories of materials. Fed. R. Crim. P. 16(c).
27 In those circumstances where a party fails to produce discovery as
28 required by Rule 16, the rule empowers the district court to

1 "prohibit the party from introducing evidence not disclosed, or it
2 may enter such other order as it deems just under the circumstances."
3 Fed. R. Crim. P. 16(d)(2)(C), (D).

4 Despite the government's requests, defendant has not produced
5 any reciprocal discovery. Accordingly, to the extent that there
6 exists reciprocal discovery to which the government is entitled under
7 Federal Rules of Criminal Procedure 12.1, 12.2, 16(b), or 26.2 that
8 defendant has not produced, the government reserves the right to seek
9 to have such materials excluded at trial. See United States v.
10 Young, 248 F.3d 260, 269-70 (4th Cir. 2001) (upholding exclusion
11 under Rule 16 of audiotape evidence defendant did not produce in
12 pretrial discovery where defendant sought to introduce audiotape on
13 cross-examination of government witness not for impeachment purposes,
14 but as substantive "evidence in chief" that someone else committed
15 the crime).

16 **VI. CONCLUSION**

17 The government respectfully reserves the right to supplement or
18 modify this Trial Memorandum as may be appropriate.
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